**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | CC Docket No. 93-36 |
| Tariff Filing Requirements | ) | |
| for Nondominant Common Carriers | ) | |
| | ) | |

**REPLY COMMENTS OF**
**THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel") respectfully submits the following reply comments in response to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.[1] CompTel joins the overwhelming majority of commenters who urge the Commission to adopt the proposed streamlined tariffing requirements for non-dominant carriers.

## I. INTRODUCTION

In these reply comments, CompTel responds to several issues raised by parties in the opening comments. Most significantly, AT&T, citing cases arising under the Interstate Commerce Act, challenges the Commission's rate range proposal as violative of the "filed rate doctrine," as well as Sections 202 and 203 of the Communications Act.[2] As

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[1] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-96 (released Feb. 19, 1993).

[2] Comments of AT&T at 4-13 ("AT&T"). See also Comments of Pacific Bell and Nevada Bell at 11-16 ("Pacific Bell").

shown below, however, the cases AT&T relies on are factually and legally distinguishable from the instant proposal.

In addition, AT&T and the Bell Operating Companies ("BOCs") contend that the Commission should, in effect, apply the proposed streamlined tariffing rules to dominant carriers.[3] These contentions are irrelevant to this docket and completely ignore the findings of the Competitive Carrier proceeding. Finally, CompTel herein supports the comments of the American Public Communications Council requesting the FCC to clarify that non-dominant operator service providers need only file one tariff.

## II. RATE RANGES AND MAXIMUM RATES ARE LAWFUL FOR NON-DOMINANT CARRIERS

### A. Rate Ranges Do Not Violate the "Filed Rate Doctrine"

In its opening comments, AT&T argues that under the Commission's rate range proposal a user's net charges would not be ascertainable from the filed tariff. AT&T therefore concludes that such rate ranges violate the "filed rate doctrine," which requires that a carrier charge only those rates on file with the Commission.[4] The case that AT&T cites in support of this assertion, however, is factually distinct

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[3] See, e.g., AT&T at 15-18.

[4] AT&T at 4-7. See Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116 (1990).

from the instant proposal: Maislin involved privately negotiated, off-tariff pricing.[5] In contrast, the Commission's rate range proposal requires carriers to charge only those rates specified in their schedule of charges. Unlike "secret" off-tariff pricing practices, rate ranges require, consistent with Section 203(c) of the Act,[6] that carriers charge only within the rate range specified in the schedule on file with the Commission.

Moreover, the Commission's rate range proposal is legally distinguishable from the other cases arising under the Interstate Commerce Act ("Commerce Act") relied upon by AT&T. All of the cases cited by AT&T involve the inflexible mandate of Section 10761(a) of the Commerce Act, which prohibits a carrier from providing services at any rate other than the filed rate.[7] In contrast to the Commerce Act, however, the Communications Act allows the FCC to modify Section 203(c),[8] the provision similar to Section 10761(a) of

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[5] 497 U.S. at 116.

[6] 47 U.S.C. § 203(C).

[7] 49 U.S.C. § 10761(a). See Regular Common Carrier Conference v. U.S., 793 F.2d 376, 379 (1990) (ICC does not possess power under the Commerce Act to modify Section 10761(a)).

[8] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor ("Competitive Carrier"), Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 481 (1981).

the Commerce Act.[9] Therefore, the Commission may lawfully allow non-dominant carriers to specify their charges in terms of a range; non-dominant carriers will remain bound by Section 203(c)'s requirement that the actual rate collected from users fall within that specified range.[10]

### B. Rate Ranges and Maximum Rates For Non-Dominant Carriers Ensure Just and Reasonable Rates As Required By Section 201(b)

AT&T seeks to discredit rate ranges and maximum rates by assuming a carrier may lawfully file an unjust and unreasonable rate maximum.[11] As CompTel demonstrated in its opening comments, however, rate ranges or maximum rates -- like any other form of rate -- must comply with Section

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[9] Compare 49 U.S.C. § 10762(d)(1) with 47 U.S.C. § 203(b)(2); See Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd 8072, 8076 (1992) ("Tariff Filing Requirements"); AT&T v. FCC, 503 F.2d 612, 616 (2d Cir. 1974) (although Congress modeled the Communications Act on the Commerce Act, the provisions of the Communications Act were modified to provide for the regulation of communications common carriers).

[10] Such narrow modification is well within the Commission's lawful power under Section 203(b)(2). See AT&T v. FCC, 978 F.2d 737, 735-36 (D.C. Cir. 1992); MCI v. FCC, 765 F.2d 1186, 1192 (D.C. Cir. 1985). Both AT&T v. FCC and MCI V. FCC forbid only "the wholesale abandonment or elimination of a requirement." See AT&T v. FCC, 978 F.2d at 735-36 (quoting MCI v. AT&T, 765 F.2d at 1192). Rate ranges are simply a different requirement as to the information contained in a tariff, not wholesale abandonment. See AT&T v. FCC, 487 F.2d 864, 879 (2d Cir. 1973).

[11] AT&T uses $10.00 per minute as its example of a rate maximum which it suggests would be reasonable. AT&T at 6.

201(b)'s mandate that all charges for a carrier's service be "just and reasonable."[12] Just as more than one rate can be found to be just and reasonable, a rate range or rate maximum can be found to be just and reasonable.

Indeed, in the rate-of-return context, the Commission and the courts have found that a "zone of reasonableness" may be used to determine a just and reasonable return.[13] Moreover, the lawful use of rate ranges or maximum rates is explicitly sanctioned in the Communications Act. Section 205 of the Act authorizes the Commission, upon finding that a

[redacted]

### C. Rate Ranges and Maximum Rates For Non-Dominant Carriers Insure Against Unreasonable Discrimination In Satisfaction Of Section 202(a)

AT&T's contention that rate ranges violate Section 203 of the Act and the filed rate doctrine is, at its core, grounded on the erroneous assumption that rate ranges run afoul of the prohibition in Section 202(a) on unreasonable discrimination.[15] AT&T suggests that rate ranges will allow carriers to discriminate unreasonably against users who cannot challenge the lawfulness of the charges.[16] AT&T's argument fails to acknowledge, however, the cornerstone of the Competitive Carrier proceeding. The Commission has found that "a non-dominant firm cannot rationally engage in the type of unlawful discrimination condemned by Section 202(a) of the Act."[17] Consequently, non-dominant carriers that specify rates in terms of a range or maximum are incapable of unreasonable discrimination. None of the cases cited by AT&T

regarding discrimination and "secret" pricing by dominant firms was perfectly justified, but inapposite to the instant proceeding.

Furthermore, rate ranges or maximum rates give users adequate information and protection. Unlike the "secret" off-tariff negotiations between dominant carriers and users in the cases cited by AT&T,[19] non-dominant carriers lack market power and thus cannot use "secrecy" to mask unlawful discrimination. Users of non-dominant carriers' service will know their own charges and the tariffed rate range or

requirements and regulatory classification.[20] As an initial matter, CompTel notes that these comments are irrelevant to the purpose of this rulemaking, which is to determine tariff filing requirements for non-dominant common carriers in the wake of the AT&T v. FCC decision.

Moreover, these requests fail to recognize that the Commission's Competitive Carrier proceeding has not been disturbed by the AT&T v. FCC decision. Dominant carriers -- such as AT&T and the BOCs -- possess market power and therefore have the ability to charge unjust and unreasonably discriminatory prices.[21] Application of streamlined

[redacted]

## IV. OPERATOR SERVICE PROVIDERS SHOULD BE PERMITTED TO FILE ONLY ONE TARIFF

In its opening comments, The American Public Communications Council ("APCC") requests the Commission to clarify that non-dominant carriers providing operator services may file one tariff in satisfaction of Section 203 and Section 226(h) of the Act.[23] CompTel supports APCC's position and urges the Commission to rule that a non-dominant operator services provider may file an ordinary Section 203 tariff that includes all the information required in a Section 226(h) informational tariff. CompTel further concurs with APCC that, in the event that two separate tariffs are required, the simultaneous filing of a Section 203 tariff and an informational tariff should not subject the filing carrier to more than one filing fee.[24]

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[23] Comments of American Public Communications Council at 3-5 ("APCC"). See 47 U.S.C. § 226(h).

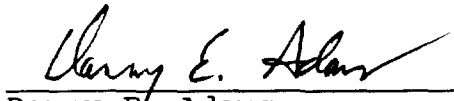
[24] APCC at 5.

## V. CONCLUSION

For the foregoing reasons, CompTel respectfully submits that the Commission is well within its legal authority in adopting the proposed streamlined tariff filing requirements for non-dominant carriers.

Respectfully submitted,

**COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

By: 

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